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IN THE

Supreme Court of the United States

October Term, 1958

NO. 166

ROBERT JOHN GROCHOWIAK,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

Appeal from the Superior Court of Pennsylvania

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. .....

Robert John Grochowiak,

Appellant

vs.

Commonwealth of Pennsylvania,

Appellee

Appeal from the Superior Court of Pennsylvania

STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the Superior Court of Pennsylvania entered on November 12, 1957, affirming the judgment of conviction of the Appellant, the Supreme Court of Pennsylvania having refused to allow an appeal from the judgment of the Superior Court of Pennsylvania, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania dated February 12, 1958, denying Appellant's petition for allowance of an appeal is not reported. The opinion of the Superior Court of Pennsylvania is reported in 184 Pa. Superior Ct. 522 and 136 A. 2d 145 (1957). The opinions of the Court of Quarter Sessions of Franklin County, Pennsylvania have not been reported. A copy of the order of the Supreme Court of Pennsylvania is attached hereto as Appendix C, a copy of the opinion of the Superior Court of Pennsylvania is attached hereto as Appendix B and a copy of the opinions of the Court of Quarter Sessions of Franklin County, Pennsylvania is attached hereto as Appendix A.

JURISDICTION

This proceeding was initiated by the filing of an information by an officer of the Pennsylvania State Police Force before a Justice of the Peace charging the Appellant with the summary offense of exhibiting motion pictures on Sunday, June 24, 1956, in violation of Section 2 of the Act of July 2, 1935, P. L. 599, Title 4, Pa. Stat. Ann. 66 (Supp. 1957). The Appellant was found guilty and by allowance of the Court of Quarter Sessions of Franklin County, Pennsylvania took an appeal to that Court, which heard the matter de novo and found the Appellant guilty. The judgment of the Superior Court of Pennsylvania affirming the judgment and sentence of the Court below was entered on November 12, 1957. A petition for allowance of appeal from the judgment of the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania was refused February 12, 1958, and the notice of appeal was filed in that Court as the Court possessed of the record on May 12, 1958.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28 U. S. Code Section 1257 (2) because the highest court of the State of Pennsylvania in which a hearing could be held found the Pennsylvania Statute was not repugnant to the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review by appeal the judgment in this cause. *Burstyn v. Wilson*, 343 U. S. 495 (1952), *Staub v. City of Baxley*, 355 U. S. 318 (1958); *Nic Motko v. Mary-*

land, 340 U. S. 268 (1951); *Hammerstein v. Superior Court of California in and for the County of Los Angeles*, 340 U. S. 622 (1951); *Lovell v. City of Griffin, Ga.*, 303 U. S. 444 (1938); *Winters v. People of State of New York*, 333 U. S. 507 (1948); *Feiner v. People of State of New York*, 340 U. S. 315 (1951).

STATUTE INVOLVED

The statute of the State of Pennsylvania whose validity is questioned is the Act of July 2, 1935, P. L. 599, Section 2, Title 4, Pa. Stat. Ann. 60 (Supp. 1957), reading as follows:

> It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibition, regardless of whether a charge of admission is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, before the hour of "two" o'clock postmeridian.
>
> It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibitions, regardless of whether a charge of admission thereto or incidental thereto is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, after the hour of two o'clock postmeridian, unless the voters of the municipality and sound motion picture exhibitions on Sunday as

hereinafter provided, and in no case shall a person be employed as a projectionist or operator of motion pictures on Sunday or in or about motion picture exhibitions, unless he or she shall have had twenty-four consecutive hours of rest during the preceding six week days.

Any person, copartnership, association or corporation violating any of the provisions of this section shall, upon conviction thereof in a summary proceedings, be sentenced to pay a fine of fifty dollars ($50.00), and in default of the payment of such fine and costs of prosecution, such person or any member or agent of any copartnership or association, or any officer or agent of any corporation, responsible for such violation, shall be imprisoned for a period of not more than ten (10) days.

The entire Act of July 2, 1935, P. L. 599, Sections 1-8, as amended, Title 4, Pa. Stat. Ann. 59-66 (Supp. 1957), is printed as Appendix D hereto.

QUESTIONS PRESENTED

The Federal Questions presented to Justice of the Peace, G. Fred Ziegler, the Court of Quarter Sessions of Franklin County, Pennsylvania, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania and on this appeal are:

(1) Whether the statutory prohibition against the conducting, staging, managing, operating or engaging in any motion picture exhibition on the first day of the week, though the exhibition be newsreels and motion pictures innocuous from every viewpoint, constitutes an abridgment of the free speech and free press guaranty of the First and Fourteenth Amendments to the Constitution of the United States.

(2) Whether the nonenforcement of the statutory prohibition against motion picture exhibitions on Sunday when such exhibitions are produced by television and the nonenforcement of other legislation imposing a day of rest upon the citizenry of the Commonwealth of Pennsylvania, constitutes an administrative deprivation of Appellant's equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(3) Whether the nonenforcement of the Act of July 2, 1935, P. L. 599, as amended, 4 Pa. Stat. Ann. 59 et seq. (Supp. 1957), as applied to motion picture exhibitions by television, the statutory approval for such exhibitions in all churches on Sunday provided

no admission is charged and in municipalities wherein such exhibitions have been authorized by local referendum and the statutory authorizations for other specific activities on Sunday renders the prohibition as applied to the Appellant a deprivation of his liberty and property without due process of law as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the statutory approval of the exhibition of religious motion pictures in any church on Sundays, the prohibition against the exhibition of motion pictures on Sundays in municipalities wherein exhibitions have been authorized by local referendum before the hour of 2:00 o'clock P. M., constitutes a legislative preference for certain religious organizations over others and interferes with rights of conscience in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On the evening of June 24, 1956, a Sunday, the Appellant in his capacity as manager of the State Line Drive-In Theatre, located along U. S. Route 11 in Antrim Township, Franklin County, Penna., exhibited or caused to be exhibited at his employer's theatre, a newsreel and certain motion pictures, one of which was available for exhibition by television at the same hour it was exhibited in Appellant's theatre. There is no contention that the motion pictures were obscene, offensive or that they had an effect on the peace and good order of the community. The exhibition of motion pictures on Sunday had not been approved by the electorate of Antrim Township, Franklin County, Penna., as provided for by the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957).

Appellant was found guilty of the violation of Section 2 of the Act of July 2, 1935, P. L. 599, 4 Pa. Stat. Ann. 60 (Supp. 1957), by Justice of the Peace, G. Fred Ziegler, and the Court of Quarter Sessions of Franklin County, Penna., allowed his petition for appeal from the judgment of conviction.

A hearing de novo was held on the matter on September 12, 1956, and arguments on the constitutionality of the Act here in question under the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvanina were heard September 21, 1956. The Court of Quarter Sessions of Franklin County, Penna., on June 7,

1957, found Appellant guilty as charged and the Act constitutional for the reasons set forth in its opinion. Motions in Arrest of Judgment reasserting the Federal and State Constitutional questions were filed and after argument were denied for the reasons set forth in the Court's opinion filed August 10, 1957. Appellant was sentenced to pay a fine of Fifty (50) Dollars and costs on August 23, 1957.

The Superior Court of Pennsylvania upheld the validity of the Act here in question for the reasons set forth in its opinion filed November 12, 1957.

Appellant petitioned the Supreme Court of Pennsylvania on December 24, 1957, to allow an appeal from the judgment of the Superior Court of Pennsylvania. Appellant's petition was denied per curiam February 12, 1958.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The four constitutional questions were first raised before Justice of the Peace, G. Fred Ziegler, in a written motion to dismiss and were refused on the ground that a magistrate may not properly pass on such questions.

The questions were next raised in the Petition for Allowance of Appeal from Judgment of Justice of the Peace by allegation that the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), violates the First and Fourteenth Amendments to the Constitution of the United States. This general allegation was made specific in the Statement of Questions filed with the Franklin County Court of Quarter Sessions and set forth thus:

I.

> Does the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 (Supp. 1957), constitute religious legislation prohibited by Article I, Section 3 of the Constitution of the Commonwealth of Pennsylvania and the First Amendment to the Constitution of the United States of America?

II.

> Does the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 (Supp. 1957), constitute a civil regulation in violation of Article I, Sections 1 and 9, and Article III, Section 7 of the Constitution

of the Commonwealth of Pennsylvania and the Fifth and Fourteenth Amendments to the Constitution of the United States of America as an unreasonable classification and for taking property without due process of law?

III.

Does the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 (Supp. 1957), . . . as applied to motion pictures constitute an abridgment of freedom of speech and of the press as guaranteed by Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania and the First Amendment to the Constitution of the United States of America?

IV.

Does the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 (Supp. 1957), as administered deprive the defendant of equal protection of the law and his liberty and property without due process of law as guaranteed by Article I, Sections 1 and 9, and Article III, Section 7 of the Constitution of the Commonwealth of Pennsylvania and the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

The Court of Quarter Sessions held the Act did not create a preference for certain religious organizations over others because the state and federal constitutional guarantees of freedom of religion were, "intended to prevent the federal or state legislatures from requiring any citizen to do violence to his conscience by performing any overt act, financial, physical or spiritual, favorable to any religion and contrary to his personal desires" (Appendix A, page 31, infra), and that the Act constituted civil regulation

to achieve uniformity as to a day of rest rather than religious legislation (Appendix A, pages 35, 36, infra).

The said Court held the Act did not deprive Appellant of his liberty and property without due process of law because it was not prepared to say there is no reasonable basis whereby the legislature could have drawn that line where it has in forbidding Sunday movies except in municipalities where such exhibition has been approved by a majority of voters (Appendix A, page 42, infra).

The Court of Quarter Sessions of Franklin County, Penna., held the Act of 1935, supra, did not constitute an abridgment of freedom of the press on the grounds (a) that the court must determine "whether in a given instance or in motion pictures generally there is an essential exposition of ideas or whether their content is of such slight social value as a step to truth that any benefit derived is outweighed by the social interest in preservation of a fixed day of rest and repose for the populace—the question of relative social utility" (Appendix A, page 50, infra), (b) that the legislature is denied the right to regulate the dissemination of information, but it does possess the power to regulate public entertainment on the assigned day of rest (Appendix A, page 51, infra).

The lower court held the enforcement of the Act did not constitute an administrative deprivation of Appellant's equal protection of the law as a result of the nonenforcement of the Act as to television exhibitions on the theory that such exhibitions are not within the purview of the Act (Appendix A, pages 44, 45, infra), and as to other legislation imposing a day of rest on the ground that the Act here in question gives greater privileges to the motion picture industry.

How Federal Questions Were Presented

The four constitutional questions were raised in Appellant's Motion in Arrest of Judgment alleging:

> (1) The Act of 1935, July 2, P. L. 599, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), as amended, contravenes the First, Fifth and Fourteenth Amendments to the Constitution of the United States . . .
>
> (2) The Act of 1935, July 2, P. L. 599, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), as administered denies the defendant equal protection of the law and his liberty and property without due process of law and thereby contravenes the Fifth and Fourteenth Amendments to the Constitution of the United States . . .

The Court of Quarter Sessions reaffirmed its conclusions above set forth as to the contentions that the Act in question constituted religious legislation, that it constituted a taking of property without due process of law and by its enforcement constituted an administrative deprivation of Appellant's equal protection of the law (Appendix A, pages 54, 55, infra), and also reaffirmed its decision on the freedom of the press question expanding its rationale to include the theories, (a) that the constitutionally guaranteed freedom of expression is only a protection as to content of expression and the incidents which accompany the expression when this occurs in the form of public entertainment characterized by the gathering of crowds, the use of the stage and the machinery for presenting the expression, then the expression is rendered subject to the exercise of the police power of the state to authorize its prohibition (Appendix A, pages 56, 60, infra), (b) that the state's police power to prohibit motion picture exhibitions extends to all such exhibitions includ

ing those in part or entirely devoted to the dissemination of current news (Appendix A, pages 60, 61, infra).

On appeal to the Superior Court of Pennsylvania, Appellant raised the four constitutional questions in his opening brief filed with that Court as required by its rules:

> 1. The Act of July 2, 1935, P. L. 599 et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), is an infringement upon an individual's constitutional rights of free speech and freedom of the press.
>
> 2. The unequal enforcement of the Act of July 2, 1935, P. L. 599, et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), constitutes an administrative deprivation of appellant's equal protection of the law and his liberty and property without due process of law.
>
> 3. The Act of July 2, 1935, P. L. 599, et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), constitutes an unreasonable classification and a taking of property without due process of law.
>
> 4. The Act of July 2, 1935, P. L. 599, et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), constitutes religious legislation prohibited by the constitutions of the United States and the Commonwealth of Pennsylvania.

The Pennsylvania Superior Court held the Act of July 2, 1935, P. L. 599, et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), does not abridge the constitutional guarantee of free speech and free press because, "a restriction on free speech which limits the right as to time or place does not infringe upon the constitutional guarantees" (Appendix B, page 68, infra).

The Superior Court of Pennsylvania held the said Act did not constitute an abridgment of freedom of re-

ligion, because although it defers "to the religious concept of Sunday as a Holy Day" and "although the provision for the lawful showing of motion pictures, only after 2:00 o'clock p.m. on Sundays undoubtedly appears in the Act in deference to the church-wide custom of Sunday morning services", it is civil legislation (Appendix B, page 66, infra).

The Pennsylvania Superior Court held the administration of the Act of July 2, 1935, P. L. 599, et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), did not constitute a denial of Appellant's equal protection of the law or the deprivation of Appellant's liberty and property without due process of law on the theory that it is not an unconstitutional discrimination to prosecute some but not all persons engaged in proscribed activities of a similar nature (Appendix B, page 68, infra).

The said Court held the Act of July 2, 1935, P. L. 599 et sec., 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), does not constitute an unreasonable classification and a deprivation of property without due process of law, but gave no explanation for its conclusion other than to hold the distinction between motion picture exhibitions and other commercial activities are genuine (Appendix B, page 69, infra).

Pursuant to the Rules of the Supreme Court of Pennsylvania Appellant petitioned the Supreme Court for allowance of appeal from the decision of the Superior Court and in his petition set forth the four constitutional questions hereinabove set forth. On February 12, 1958, the Supreme Court entered the following order:

"February 12, 1958, petition denied. Per Curiam."

THE QUESTIONS ARE SUBSTANTIAL

1. The Court below has decided a statute directly impairing freedom of the press in manner conflicting with the applicable decisions of this Court. Since the holding of the Supreme Court in *Burstyn v. Wilson*, 343 U. S. 495, 502 (1952), it is *settled law* that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." This Court held in *West Virginia State Board of Education et al. v. Walter Barnette et al.*, 319 U. S. 624, 638 (1943), "One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no election." "The freedom guaranteed by the First Amendment occupies a preferred position under our law to such an extent that the courts when considering whether legislation infringes upon them, neutralize the presumption in favor of constitutionality." *Thomas v. Collins*, 323 U. S. 516 (1944).

The Act of July 2, 1935, P. L. 599 et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), goes far beyond reasonable police power restrictions, for the relevant portions of the said Act upheld by the Courts below constitute a total prohibition against the exhibition of any motion picture including news on the first day of the week in the Commonwealth of Pennsylvania unless such exhibitions are authorized by local referenda. Thus freedom of expression and the corollary freedom to receive information

for one-seventh of each week is dependent upon the outcome of an election, upon the whims of a majority; the judgment of the municipality is substituted for the judgment of the individual.

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."
>
> *Martin vs. Struthers*, 319 U. S. 141, 146, 147 (1943).

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."
>
> *West Virginia State Board of Education et al. v. Walter Barnette et al.*, 319 U. S. 624, 638 (1943).

> "The power of a state to abridge freedom of speech and of a summary assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justifications in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitations upon individual liberty must have appropriate relation to the safety of the state."
>
> *Herndon v. Lowery*, 301 U. S. 242, 258 (1937).

In the instant case there is no evidence of danger to organized government or to any segment of the populace,

no proof of invasion of the well-being and tranquility of the community. Indeed the courts below make no effort to justify the abridgment of freedom of expression by motion pictures, and the lack of danger is legislatively acknowledged by the authorization for local referenda to remove the prohibition.

> "The First and Fourteenth Amendments say that the Congress and the states shall make 'no law' which abridges freedom of speech or of the press."
>
> *Superior Films v. Dept. of Education of the State of Ohio*, 346 U. S. 587, 589 (1954).

The Sunday statute here in question directly affects freedom of speech and the press. The constitutionality of Sunday statutes affecting these fundamental freedoms has never been passed upon by this Court. The state courts have, therefore, decided an important question of fundamental federal law in favor of the constitutionality of the said Act and against the guaranteed freedoms of the individual. The Act of July 2, 1935, P. L. 599 et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), can neither be squared with the First Amendment nor with the previous decisions of this Court and the opinions of the Courts below on this question amply demonstrate the need for this Court to allow this appeal and clarify the status of the fundamental freedom of speech and the press.

2. The Act of July 2, 1935, P. L. 599 et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), creates a direct preference in favor of religious organizations celebrating the first day of the week as a Holy Day by reason of the statutory exception awarded to the exhibition of religious motion pictures in churches and the prohibition against all other exhibitions before the "hour of two

o'clock postmeridian on Sunday", which the Superior Court of Pennsylvania acknowledges is, "in deference to the church-wide custom of Sunday morning services", and further constitutes a direct interference with the religious beliefs of those who celebrate a day other than Sunday and subscribe to the Fourth Commandment's injunction to labor on six days.

The record establishes the existence of religious organizations dedicated to the beliefs that a day other than Sunday should be celebrated as a Holy Day and that the Fourth Commandment not only represents a scriptural injunction against labor on the Sabbath, but also an affirmative direction to labor on the remaining six days of the week.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."
>
> *Everson v. Board of Education*, 340 U. S. 1, 15, 16, 91 L. Ed. 723 (1946).

The Act here in question is a direct statutory descendant of the Act of 1794, 3 Sm. L. 177, re-enacted as the Act

of 1939, P. L. 872, Sec. 699.4, 18 P.S. 4699.4, and the religious nature of the parent legislation is most clearly evidenced in the case of *Commonwealth v. Pedano*, 33 D. & C. 551 (1938), cited with approval by the Superior Court of Pennsylvania.

The wording of the Act here in question as to prohibitions and exceptions, the history of the Act, the interference with the legitimate beliefs of others and the conclusion drawn by the Superior Court of Pennsylvania necessarily constitute an attempted breach in the constitutionally erected "wall of separation between church and state" and demonstrates the need for this Court to allow this appeal and hold unequivocally that preference for any religious establishment or impediments to any legitimate religious beliefs are unconstitutional and alien to our concept of separation of Church and State.

3. The third constitutional question presented involves a determination of whether the enforcement of the Act of July 2, 1935, P. L. 599, et sec., as amended, 4 Pa. Stat. Ann. 59 et sec. (Supp. 1957), so as to ignore all motion picture exhibitions other than commercial exhibitions in theatres constitutes an administrative deprivation of Appellant's equal protection of the law and a denial of due process of law.

The Supreme Court of Pennsylvania in *Philadelphia Retail Liquor Dealers Assoc. et al. v. Pennsylvania Liquor Control Board et al.*, 360 Pa. 269, 273, 274 (1948), found the phrase "moving picture exhibitions" included motion pictures exhibited by television. Despite this clear cut decision the officers of the Pennsylvania State Police Force made no effort to enforce the said Act in Antrim Township, Franklin County, Penna., except as to the defendant.

The incongruity and inequality of such enforcement is brought sharply into focus by the evidence that the same motion picture was available for exhibition on television sets in the same municipality at the same time on the same day.

> "Though a law be fair on its face and impartial in appearance, yet, if it applied with an unequal hand, so as practically to make unjust and illegal discriminations between persons of similar circumstances, material to their rights, the denial of equal justice constitutes a denial of due process of the law guaranteed by the Fifth and Fourteenth Amendments".
>
> *Yick Wo v. Hopkins*, 118 U. S. 356 (1885).

Television is a substantial competitor of motion picture exhibitions and the administration of this Act not only deprives appellant of his equal protection under the law, but enhances the value of a competitor in similar circumstances.

> "The validity or invalidity of a statute often depends on how it is construed and applied."
>
> *Rogers v. Alabama*, 192 U. S. 226 (1904).

For these reasons, it is respectfully submitted the unequal enforcement of the law contrary to prior decisions of the Courts presents a substantial question for consideration by this Court.

4. The ~~third~~ Fourth constitutional question involves a determination of whether the legislation here in question constitutes an unreasonable classification depriving the appellant of his equal protection of the law and his property without due process of law.

The Act of July 2, 1935, P. L. 599 et seq., as amended, 4 Pa. Stat. Ann. 59 et seq. (Supp. 1957), prohibits all ex

hibitions of motion pictures on the Sabbath with but two exceptions, viz., exhibition of religious motion pictures in a church where no admission is charged and in municipalities where a majority of the voting populace have approved such exhibitions. The prohibition of the said Act is effective "whether labor or business is necessary". Act of July 2, 1935, P. L. 599, Sec. 2, 4 Pa. Stat. Ann. 60 (Supp. 1957).

Sunday legislation has generally been upheld on the theory the purpose of such legislation is to insure to the general populace one day of rest in seven and for the efficient organization of society the day may not be a floating day. Only on this theory can such legislation be upheld as a constitutional exercise of the state's police power.

Testing the theoretical foundation of Sunday legislation against the Act in question, the Act lacks constitutional sanction and infringes upon the guarantees of the Fourteeth Amendment in that there is no reasonable basis for the prohibition if "labor or business" is immaterial. Further there is no reasonable distinction between exhibitors of motion pictures in churches or in municipalities approving motion picture exhibitions and exhibitors in municipalities where such exhibitions have not been approved. If a fixed day of rest is essential to exhibitors of motion pictures, the fact cannot be altered by the place where the exhibition takes place or by the geographic location or mood of the electorate.

The legislature of the Commonwealth of Pennsylvania has by the Act of 1939, P. L. 872, Section 699.4, 18 Pa. Stat. Ann. 4699.4, created a blanket prohibition against any worldly business, sports or diversions on the Sabbath, but statutory exemptions have been granted fishing, Act of

1937, P. L. 312, Sec. 1, 30 Pa. Stat. Ann. 265; removing animals from traps, Act of 1955, P. L. 243, 34 Pa. Stat. Ann. 1311, 702; parading of veterans, Act of 1913, P. L. 489, 51 Pa. Stat. Ann. 623; selling of liquor or beer in private clubs, Act of 1951, P. L. 90, 47 Pa. Stat. Ann. 1-101 et sec.; playing or conducting games of tennis, Act of 1935, P. L. 449, 4 Pa. Stat. Ann. 181; holding musical concerts, Act of 1933, P. L. 1423, 4 Pa. Stat. Ann. 121. Further the Court below acknowledged violations of the Act of 1939, supra, are "blinked at in many areas" (Appendix A, page 46, infra).

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare . . . A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."
>
> *Liggett Company v. Baldridge*, 278 U. S. 105, 111, 112, 113 (1928);
>
> *New State Ice Company v. Liebman*, 285 U. S. 262 (1932).

There is no substantial relation to public health, safety, morals or general welfare legislation founded on the theory of public need for a fixed day of rest which prohibits motion picture exhibitions on the Sabbath only if the exhibitions do not occur in churches and then only so long as the electorate of a municipality do not vote to approve such exhibitions. Particularly is this true when

viewed in relation to other specific legislation authorizing other varieties of Sunday activities certainly not conducive to a fixed day of rest.

The question of the constitutionality of the multitude of Sunday closing laws effective in some form in every state of the United States has been repeatedly raised in the various state courts with varying results (See. 18 A.L.R. 738, 20 A.L.R. 1111, 29 A.L.R. 397, 37 A.L.R. 575, 46 A.L.R. 290, 62 A.L.R. 642, 98 A.L.R. 1088, 119 A.L.R. 752, 24 A.L.R. 2d 813, 57 A.L.R. 2d 969) and this Court has consistently refused to hear the question. Thus an important area of federal law governing civil rights under the Fourteenth Amendment has become beclouded, the validity of legislation such as that here in question uncertain and a fertile breeder of litigation. We think it clear only by allowing this appeal can the law of the land on this subject be clarified.

CONCLUSION

For the foregoing reasons this appeal should be allowed.

Respectfully submitted,

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APPENDIX A

OPINIONS OF THE COURT OF QUARTER SESSIONS OF FRANKLIN COUNTY, PENNSLYVANIA

(1) OPINION AND ORDER OF JUNE 7, 1957

This matter comes before the court on appeal from the conviction and sentence entered against the defendant on July 10, 1956, after hearing held July 3, 1956, by G. Fred Zeigler, Justice of the Peace, of the Borough of Greencastle, Franklin County, Pennsylvania. The defendant was sentenced to pay a fine of $50.00 and costs of $9.00 by reason of violation of Section 2 of the Act of 1935, P. L. 559 (4 Purdon 60, et seq.) known as the Sunday Motion Picture Act. The matter of appeal in such cases is provided by the Act of April 17, 1876, P. L. 29 as amended (19 Purdon, sec. 1189). The case was heard de novo by the Court of Quarter Sessions on September 12, 1956.

From the evidence it is clear that there was on the Sunday evening of June 24, 1956, at the State Line Drive-In Theater located along U. S. Route 11 in Antrim Township, Franklin County, an exhibition of motion pictures contrary to the provision of the Sunday Motion Picture Act previously mentioned, and that the exhibition was carried on by the defendant, who was present at the theater and was acting in the capacity of manager, ticket seller and

otherwise. The defendant seeks dismissal of the prosecution upon the ground that the statute under which it was made is unconstitutional.

The defendant's argument of unconstitutionality is based upon four grounds, which we list in this sequence:

1. The Sunday Motion Picture Law constitutes religious legislation falling within the prohibition of the first amendment to the constitution of the United States, which, defendant avers, was made applicable to the states by means of the fourteenth amendment, and further that the law constitutes religious legislation prohibited by Article I, Section 3 of the constitution of Pennsylvania.

2. The Sunday Motion Picture Law is in violation of Article I, Sections 1 and 9, and Article III, Section 7 of the constitution of Pennsylvania and of the fifth and fourteenth amendments to the constitution of the United States as constituting civil regulation of the defendant and his business and interference with his liberty of employment by means of an unreasonable classification and therefore that the Act constitutes a taking of property without due process of law.

3. Even assuming that the Act is constitutional in form, defendant contends that it is unconstitutional and discriminatory as administered by the public authorities of the Commonwealth and thus in practice, denies to defendant the equal protection of the law; that his liberty and property have been taken without due process of law, contrary to Article I, Sections 1 and 9, and Article III, Section 7, of the Constitution

of Pennsylvania and the fifth and fourteenth amendments to the Constitution of the United States.

4. The Sunday Motion Picture Law violates Article I, Section 7 of the Constitution of Pennsylvania and the first amendment of the Constitution of the United States because it abridges freedom of speech and freedom of the press.

When the constitutionality of a law is challenged, it is well known that the work of the legislature, elected by the people, a co-equal branch under our tripartite system, enjoys the presumption of constitutionality. To declare a law unconstitutional that fact must be, to the court, abundantly clear. It is not the function of the courts to legislate.

In Sabolsky vs. Messner, 372 Pa. 47, at pages 58,59, our Supreme Court said: ". . . It is axiomatic that he who asks to have a law declared unconstitutional takes upon himself the burden of proving beyond all doubt that it is so . . . All presumptions are in favor of the constitutionality of acts, and courts are not to be astute in finding or sustaining objections to them . . ." Hadley's Case, 336 Pa. 100, 104, 6 A. 2d 874. In Kelley vs. Baldwin, Auditor General et al., 319 Pa. 53, 54, 179 A. 736, our Supreme Court said: "An act may not be declared unconstitutional unless 'it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation in our minds'. Sharpless vs. Mayor, 21 Pa. 147, 164; Tranter vs. Allegheny Co. Authority, 316 Pa. 65, 75."

However, in the converse, as is stated in the case of Hertz Drivurself Stations, Inc. vs. Siggins, 359 Pa. 25; 58 A. 2d 464; 7 A.L.R. 2d 438, 453, "A law repugnant to

the Constitution is void and it is not only the right but the duty of a court so to declare when the violation unequivocally appears." (Marbury vs. Madison, 1 Cranch 137, 175-180, 2 L. Ed. 60 (1830)).

The Sunday Motion Picture Law provides in brief that no person shall conduct any motion picture exhibition, whether there is a charge for admission or not, or whether any work is necessary to conduct the same or not, on the first day of the week, commonly called Sunday, before two o'clock in the afternoon. Then it goes on to say that after two o'clock, the conducting of a motion picture exhibition shall be unlawful unless the voters of the municipality have first voted in favor of motion picture exhibitions on Sunday. The violation is made a summary conviction and a penalty of $50.00 fine or ten days' imprisonment is provided. (Had the legislature been in a more practical mood when drafting the law it would have set up a graduated system of penalties in event of continued violations as is done in the case of violations of some other laws, such as those against selling unlicensed liquor.) The statute goes on to prescribe the procedure to be used in placing the question of Sunday motion pictures on the ballot of any municipality. It provides in Section 4 (4 Purdon, Section 62) that if the vote is not in favor of motion pictures then it shall be unlawful to exhibit the same on Sunday. But an exception is granted so that exhibition of *religious* motion pictures at *churches*, upon church property and without any admission charge shall not be prohibited by the Act. This was an amendment of June 20, 1947, P. L. 684 (4 Purdon, Section 64.1).

Defendant's argument and brief allude at several places to the Act of April 22, 1790 (known as the Blue

Law) re-enacted June 24, 1939, P. L. 872, Section 699.4 (18 Purdon, Section 4699.4). The latter law in its Section 9 (repealer), sets forth that the Act of April 22, 1794, is repealed insofar as relates to the subject matter of the Sunday Motion Picture Law. But the present defendant is not charged under the law of 1794 or of 1939.

It may be noted in passing that the Sunday Motion Picture Law was before our Superior Court in the case of Commonwealth v. Albano, 169 Pa. Super. 462 (1951) where the constitutionality of the Act was not questioned. Defendant sought to be exonerated from the prosecution on the ground that he was not the owner of the drive-in theater, but was merely a projectionist. The conviction was affirmed.

I.

PREFERENCE FOR A RELIGIOUS ESTABLISHMENT

The Pennsylvania Constitution at Article I, Section 3, provides:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can in any case whatever; control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

The United States Constitution in its first amendment provides, inter alia:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

It is worthwhile to stop a moment to examine the text of the provisions which deal with religious freedom in these two constitutions. The language used in the federal constitution, first amendment, is extremely broad, in its first clause, where the statement is that "Congress shall make no law *respecting* an establishment of religion". The Supreme Court has decided that this provision, coupled with the fourteenth amendment, constitutes a limitation upon the states also. Everson v. Board of Education of the Township of Ewing, 330 U. S. 1; 91 L. Ed 711 (1946). The Pennsylvania Constitution states that no preference shall ever be given by law to any religious establishment.

The defendant has endeavored to show by evidence and argument that the Sunday Motion Picture Law is, in fact, if not in express language, enacted as a preference in favor of those branches of Christianity which celebrate the first day of the week as the Lord's Day and that thereby there is a discrimination against the Seventh Day Adventists, Seventh Day Baptists, Orthodox Jews, and other citizens whose religion holds that the Lord's Day properly extends from the setting of the sun on Friday evening until the sun's setting on Saturday evening. The defendant further argues that the intent and character of the Sunday Motion Picture Law, by reason of the amendment enacted in 1947 which permits motion pictures of a religious na-

ture to be exhibited on Sunday in churches, clearly displays a preference for certain religious establishments.

Considering the broad language employed in these several constitutional provisions which forbid legislative preference for any religion or any enactment *respecting* a religious establishment, defendant's argument presents a very close question. It should be noted that the present Motion Picture Law at no point mentions any religious establishment in particular or sets forth any mandate requiring any person to worship or to contribute toward the maintenance of any certain religious establishment. It is our view that these provisions in the constitutions were intended to prevent the federal or state legislatures from requiring any citizen to do violence to his conscience by performing any overt act, financial, physical or spiritual, favorable to any religion, and contrary to his personal desires.

The Motion Picture Law nowhere mentions any religious establishment in particular nor does it require any citizen to do any act in support of or in preference to any religion. All it does is enjoin the exhibition of motion pictures on Sunday unless there has been a favorable vote by the people in the particular municipality. Despite the particular hour of Sunday—two o'clock p.m.—at which the act permits exhibition of movies to commence in event of a favorable vote, and to the fact that religious movies are permitted, we do not find this to be a law *respecting* or *preferring* any particular establishment of religion.

The type of law we are concerned with here has been the subject of decision in many states. These laws, known as "Sunday Closing Laws", have, in the main during the

past 175 years of the American Constitution, been upheld by the courts. The Constitution of the United States of America, analysis and interpretation, U. S. Printing Office (1953) p. 1031. They have not been found to be in contravention of the constitutional provisions concerning freedom of religion. The decision has generally gone on the basis that the state has power to make reasonable laws and regulations for advancing the safety and health of its citizens, commonly known as the police power, and that the legislature in passing laws requiring businesses to close on Sunday, has done so for the purposes of insuring to the general population one day of rest in seven and on the ground that for the efficient organization of society this day could not well be a floating day, but should be fixed at a day certain of each week and that Sunday may properly be fixed as such day.

A number of state legislatures have repealed their Sunday closing laws and have substituted a law requiring that every employee have one day of rest in seven, without specifying the day. Among these states are Arizona, California, Oregon, Wisconsin and Wyoming. Emerson and Haber, "Political and Civil Rights in the United States" (1952) page 987.

In the following cases Sunday closing laws have been upheld:

> Irishman's Lot v. Cleary, 62 N.W. 2d 668; 338 Mich. 662. Petit v. Minnesota, 177 U. S. 164, 20 S. Ct. 666; 44 L. Ed. 716; Rogers v. State, 60 Ga. App. 722; 4 S.E. 2nd 918 (1939); State v. Grabinski, 33 Wash. 2nd 603; 206 Pac. 2nd 1022 (1949); State ex rel. Temple v. Barnes, 22 N.D. 18; 132 N.W. 215

(1911); Gundaker Central Motors, Inc. v. Gossert, (N. J.) 127 A. 2d 566; Mosko et al. v. Dunbar, rehearing, Supreme Court of Colorado, April 1, 1957, not yet reported.

In the Gundaker case decided recently in New Jersey, the Supreme Court of that state in an opinion by Vanderbilt, C. J., has upheld a law prohibiting the sale of automobiles on Sunday, stating "The State has an absolute right to enter here and force on all and every one so engaged regulations for the benefit of the public, and it is not for the court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to public or social evils requiring similar legislation that are yet unregulated."

Legislation regulating the playing on Sunday of various sports has been enacted in Pennsylvania. Many of these sports do not require the labor of any particular individual. But employees are required in order to operate a theater. The reasoning that has in the past supported Sunday closing laws is sufficient in our view to permit the legislature to fix a certain day of rest for theater employees. We do not consider that providing for a local referendum which may permit the exhibition of Sunday movies makes the Act unconstitutional.

Where there is such a favorable vote, the day of rest for the operator will have to fall on some other day than Sunday. It may be noted that the Act of 1937, P. L. 195, Section 1; 43 Purdon, Section 481, provides as follows:

"Every employer operating or having operated a place in which motion pictures are shown, shall allow

each person employed in or about such place at least one calendar day of rest in each calendar week. Such day of rest shall be at least twenty-four consecutive hours of duration."

The question here before the Court has been decided in Pennsylvania in the case of Specht v. Commonwealth, 8 Pa. 312 (1848). There the defendant, a cooper, was charged with having performed worldly employment on the Lord's Day, Sunday, in that he had hauled manure, contrary to the Act of April 22, 1794 (the Blue Law). His defense was that he was a member of the Seventh Day Adventist Baptist congregation at Snow Hill, in Franklin County, and that the law was unconstitutional in that it created a preferential position for some Christians who hold that the first day of the week is a holy day. He contended that his religion held that the seventh day of the week is held and enjoined him from performing any work that day, and as the Sunday law deprived him of worldly employment during the first day, there were left to him only five days a week for remunerative employment, a visible discrimination. He argued further that according to the tenets of his own religion, Seventh Day Baptist, each member is absolutely required to work during the six days exclusive of the holy day and that by means of the Sunday legislation the state undertook to prevent him doing that which his own religion *required* him to do. The court held the statute constitutional because it did not require any person to worship in any particular way and left all at equal liberty to worship as they see fit and when, and that people generally benefit by a period of rest from their labors and it is within the province of the legislature to require one day of rest in seven and to assign the day.

In Indiana it is held that Sunday laws to be valid, must exempt persons whose religious dictates call for a day of rest other than Sunday. Johns v. State, 78 Indiana 332 (1881); Emerson and Haber, supra, p. 987.

In Omit v. Commonwealth, 21 Pa. 426 (1853), the defendant was prosecuted for selling liquor on Sunday and his defense was that his license as an innkeeper for the selling of spiritous liquors was not limited and therefore entitled him to sell during the 365 days of the year, the Act of 1794 to the contrary notwithstanding. The court held that the two statutes have to be considered together so as to preserve the validity of each and that the defendant was properly convicted.

The matter has been summarized as follows in Emerson and Haber, supra, pages 986 and 987:

> "Sunday laws are now almost universally sustained as a valid exercise of the state's police power in safeguarding health and preserving the morals and good order of society. The state's objective is to assure the physical, intellectual and moral welfare of its citizens by providing one day's rest in seven from the strain of uninterrupted labor. Thus, limitations on Sunday labor are construed as civil regulations designed to achieve uniformity as to a day of rest, and its enforcement is to protect those entitled to its benefits. The fact that it coincides with a day celebrated by a particular church does not detract from its character as a civil regulation under the police power."

Carr v. State, 175 Ind. 241, 93 N.E. 1071 (1911);

People v. Havnor, 149 N. Y. 195, 43 N.E. 541 (1896);

State v. Petit, 24 Minn. 376, 77 N.W. 225 (1898);

State v. Powell, 58 Ohio St. 324, 50 N.E. 900, 41 L.R.A. 854 (1898);

Ex parte Andrews, 18 Cal. 678 (1861);

Frolickstein v. Mayor of Mobile, 40 Ala. 725 (1867);

Judefind v. State, 78 Md. 510, 28 Atl. 405, 22 L.R.A. 721 (1894).

"Ultimately, the valid exercise of the state's police power requires that there be a substantial nexus between the end to be achieved and the legislation enacted for that purpose, accomplished without interference with the fundamental rights guaranteed to the individual."

Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205 (1887).

See also Pfeffer, "Church, State and Freedom" (1953), p. 227, et seq.

We conclude that the Act is not unconstitutional under the constitutional prohibitions against religious legislation.

II.

UNREASONABLE CLASSIFICATION AND DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

Defendant next contends that the Sunday Motion Picture Act is unconstitutional under the constitution of

Pennsylvania because the Act under Article I, Sections 1 and 9, and Article III, Section 7, prescribes an unreasonable classification and under the fifth and fourteenth amendments to the federal constitution, deprives defendant of property without due process of law.

Article I, Section 1 of the Constitution of the Commonwealth of Pennsylvania provides, inter alia:

> "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Article I, Section 9 of the Pennsylvania Constitution provides, inter alia:

> ". . . nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

Article III, Section 7 of the Pennsylvania Constitution provides, inter alia:

> "The general assembly shall not pass any local or special law: Regulating labor, trade, mining or manufacturing."

The fifth amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The fourteenth amendment to the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These constitutional provisions mean in brief and ordinary language that in fairness to all parts of the population, the legislature is not permitted to pass laws which place burdens on some or grant privileges to other factions or individuals of the population and not to others, unless there is some reasonable basis for the classification. Otherwise the act is discriminatory and cannot be squared with the basic law, the constitution.

The law in Pennsylvania as to what legislation will be stricken down by the Court as unfairly discriminatory and based on unreasonable classification has been set forth in LaPlacca et al. vs. Philadelphia Rapid Transit Co., 265 Pa. 304 (1919) as follows:

> "It may be conceded that for certain purposes such, for example, as regulation of their rights and duties, members of particular trades, professions or occupations, may be properly classified. Such grouping is subject, however, to the qualification that the basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction between the members of the class and the general public, and based upon 'a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class

separately, that would be useless and detrimental to the others'."

To the same effect are Kurtz v. Pittsburgh et al., 346 Pa. 362 (1943); Hertz Drivurself Stations, Inc. v. John Siggins, Jr., 359 Pa. 25; New State Ice Co. v. Liebmann, 285 U. S. 261; 76 L. Ed. 747; Liggett Co. v. Baldrige, 278 U. S. 105; 73 L. Ed. 204.

The highest courts in a number of states have held unconstitutional because of discriminatory and unreasonable classification various statutes requiring closing of businesses on Sunday, and allowing at the same time, a number of exceptions. Among these cases are Gronlund v. Salt Lake City, 194 Pacific 2nd 464 (1948); Broadbent et al. v. Gibson et al., 140 Pacific 2nd 939 (1943); City of Mr. Vernon v. Julian, 369 Illinois 447; 17 N.E. 2nd 52 (1938); City of Springfield v. Smith, 19 S.W. 2nd 1 (1929).

In striking down a Pennsylvania statute which required that owners of drugstores be registered pharmacists, the United States Supreme Court stated:

> "The police power may be exerted in the form of state legislation here otherwise the effect may be to invade rights, guaranteed by the Fourteenth Amendment, only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare . . . A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."
>
> Liggett Company v. Baldrige, 278 U. S. 105; 73 L. Ed. 204.

In the present case the defendant is not the owner of the theater but is an individual employee and therefore we cannot be here concerned as a constitutional matter with any deprivation of property which may be asserted by the theater *owner*. The enforcement of the statute would, however, affect defendant as an employee in limiting his right to labor on Sunday in this occupation if there is such a right, and therefore he does have standing to contest the legality of the statute.

In the original Sunday law of 1794, it may be noted that exceptions were embodied in that statute for so-called works of necessity, namely "preparing of victuals in private families, bake houses, lodging houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, for water ferrymen and the delivery of milk and the necessaries of life." With the passage of time and changing conditions, it is not unlikely that the legislature may reasonably find that other classifications of work should be excepted from the provisions of the law.

In fact, modern legislation in Pennsylvania has specifically excepted from the Sunday closing statute the following:

Fishing, Act of 1937, P. L. 312, sec. 1; 30 P.S., sec. 265;

Removing animals from traps, Act of 1955, P. L. 243; 34 P.S., sec. 1311.702;

Parading of veterans with military band for burial or divine ceremonies, Act of 1913, P. L. 489; 51 P.S., sec. 623;

Clubs holding liquor or beer license, Act of 1951, P. L. 90; 47 P.S., sec. 1-101, et seq.

Playing or conducting of tennis game, Act of June 22, 1935, P. L. 449; 4 P.S., sec. 181;

Playing or conducting of baseball and football, Act of April 25, 1933; P. L. 74; 4 P.S., sec. 82;

Playing or conducting of polo games, Act of June 22, 1935; P. L. 446; 4 P.S., sec. 151;

Holding of high class musical concerts, Act of June 2, 1933, P. L. 1423; 4 P.S., sec. 121.

The legislature by the Act of 1794, reenacted in 1939, forbade worldly labor on the first day of the week in order to advance the rest and repose, health and stamina of the population. It would be incorrect to say that the legislature of 1935, when enacting the Sunday Movie Law, at a time before the development of the *outdoor* movie, specifically had in mind the question of forbidding *outdoor* Sunday movies in municipalities where the inhabitants would vote in the negative, with the possible thought in mind of preventing the convergence upon the public highway on Sunday of large crowds conveyed by automobiles and otherwise to a location along a principal highway or elsewhere, such as that presented in the case of the State Line Drive-In Theater. Irrespective of the effect of the law on indoor or outdoor movies, we cannot say that the legislature, in enacting this law, and the citizens of Antrim Township in voting against the Sunday movies, were without any possible justification that the court is bound to recognize under the police power, nor that the legislature is entirely outside the realm of reason in determining that by local option citizens of a municipality may by vote decide that Sunday movies as to their municipality are inimical to conditions of rest, relaxation and repose.

In viewing the statutory exceptions which are enumerated above, which the legislature has in recent years ingrafted upon the Sunday law of 1794 and 1939, is it noted that they deal in the main with the field of sports and outdoor recreation, whether by players or spectators, though unquestionably some work would be involved in some instances for those persons who operate the particular sporting event. The same is true of a restaurant or hotel. In the case of Sunday movies, whether indoor or outdoor, as related to the permitted enterprises just mentioned, the line of distinction may lack something of crystal clarity, but we are not prepared to say there is no reasonable basis whereby the legislature could have drawn that line where it has, in forbidding Sunday movies, except in municipalities where such exhibition has been approved by a majority of the voters.

III.

THE ACT IS DISCRIMINATORY AND UNCONSTITUTIONAL AS APPLIED BY THE PUBLIC AUTHORITIES

Defendant contends that the Sunday Movie Law must be held unconstitutional for the reason that there is a systematic and unfair discrimination by the public authorities in its enforcement, in that numerous other illegal and worldly activities flourish on Sundays in the township, county and state, unimpeded, whereas defendant is singled out for prosecution. Defendant further argues that the Sunday Movie Law cannot be legally applied to the State Line Theater unless at the same time the public authorities

in Antrim Township and elsewhere prevent the showing of movies in homes by television on Sunday, and unless the public authorities make prosecutions against persons for the violation of the Blue Law of 1794 and of 1939 against gasoline stations, diners, frozen custard stands, grocery stores, roadside fruit and produce stands, golf courses, swimming pools, bowling alleys, skating rinks, amusement parks, newspaper stands, drug stores, taxicab companies, bus lines, radio stations and other businesses.

The case law which defendant here relies on has held that even where on the surface the law is reasonable in its classification of the persons upon whom it impinges, if in its application, there is a systematic discrimination by the government, the law will be stricken down as unconstitutional. In Yick Wo v. Hopkins, 118 U. S. 356 (1885), it appeared that under a city ordinance for licensing laundries, licenses were in practice isued to Caucasians only and were denied to Chinese. The United States Supreme Court held that the fourteenth amendment had been violated in that the defendant was deprived of the equal protection of the laws. The Court said "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons of similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution". Weaver, Constitutional Law, section 274, page 404; Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255. Mention also may be made here of statutes in some southern states which on their face provide for selection of jurors from the citizenry in an unobjectionable manner, but which as ap-

plied in fact habitually exclude negroes. These have been held to deny to negroes the equal protection of the laws and criminal convictions of negroes under such a system have been reversed by the United States Supreme Court. Norris v. Alabama, 294 U. S. 587; 79 L. Ed. 1074.

We are not, however, persuaded by this argument as to discriminatory application of the motion picture law. Defendant referred to the great increase in the number of TV sets throughout the state and nation and describes the severe competition that this mode of entertainment presents today to the motion picture industry. Irrespective of this, we find that the legislature in prohibiting motion picture exhibition on Sundays was not using these words in a sense that would embrace the home viewing of TV, but was using the word "exhibition" in the commonly accepted sense of a public display. The gravamen is that the display shall be *public*. "Exhibition is defined in Webster's New International Dictionary, second edition (1954), inter alia, as follows:

> "2. Act or instance of exhibiting for inspection, or of holding forth to view, manifestation; display. 3. (a) That which is exhibited, held forth, or displayed. (b) Any public show; a display, as of works of art, or of feats of skill, or of oratorical or dramatic ability. (c) Specif. (with reference to laws requiring a license for public exhibitions), a display or show where the display itself is the chief object and from which the exhibitor derives or expects to derive a profit; as, an industrial exhibition."

In Philadelphia Retail Liquor Dealers Association et al. vs. Pennsylvania Liquor Control Board, et al., 360 Pa.

269 (1948) the Court held that a tavern operator if he uses a TV set for his customers, is presenting a motion picture exhibition within the terms of the liquor control law and therefore must comply with the pertinent licensing provisions. The defendant here argues that under that decision, the use of TV sets in homes also constitutes an exhibition and that in consequence wherever TV sets are being operated on Sunday in homes presenting motion pictures, the Sunday Motion Picture Law is being violated and that there is a systematic failure by the police of the state to prosecute such home TV owners. Consequently defendant contends that a forbidden discrimination occurs here in the application of the Sunday Motion Picture Law, so that the latter is unconstitutionally administered.

Our conclusion is to the contrary. In our view "exhibition" means a public display. Nothing in the decision of of the Liquor Dealers case just referred to holds otherwise. A TV showing in a tavern is a public showing for profit. The public exhibition forbidden by the Motion Picture Law is, in our view, that which occurs in a public place, generally for money, although the statute expressly makes immaterial the element of admission price. In the case of home TV, neither the factor of public display nor the factor of profit is present. The home viewing of TV shows, whether live or filmed, is unrelated in our view to the present statute and to the prosecution here involved.

With regard to defendant's contention as to types of business that are permitted to operate in violation of the law of 1794 and of 1939 without prosecution by the public authorities, we perceive that a number of the businesses referred to, such as a diner, may be considered as falling reasonably within the categories expressly exempted in the

original statute of 1794 because of public necessity in the way of food and lodging. With reference to other occupations where violations are blinked at in many areas we are not prepared to reach the conclusion proffered by defendant. Even though the law of assault and battery or that against larceny or numbers writing be frequently violated, that fact is no defense to the individual who is prosecuted. The law we are now concerned with is a separate statute recently enacted which gives greater, not fewer, privileges to the moving picture industry than it previously possessed, and will have to rise or fall on its own individual merits.

IV.

FREEDOM OF SPEECH AND PRESS

We come now to defendants' argument that the Sunday Motion Picture Law is an unconstitutional infringement upon the freedom of speech and of the press, guaranteed by Article I, section 7 of the Constitution of Pennsylvania and the first amendment of the United States Constitution, as made applicable to the states by the fourteenth amendment.

These several provisions read as follows:

Article I, Section 7 of the Constitution of Pennsylvania:

> "The printing press shall be free to every person . . . . . and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print

on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter . . . ., where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

The First Amendment of the Constitution of the United States provides:

"Congress shall make no law . . . . abridging the freedom of speech, or of the press; . . . ."

The language of these provisions is such as to protect fully the product of printing press and of oral statement, but the same effect has been extended by judicial decision to include other media of public information. The United States Supreme Court in Joseph Burstyn, Inc. vs. Wilson, 343 U. S. 495; 96 L. Ed. 1098 (1952), held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." The court decided that the New York censor could not ban a film (The Miracle) as "sacrilegious", for the reason that the latter term, as employed by the statute, was too vague.

It is settled, however that none of the constitutional freedoms is absolute. (Fitzgerald v. Philadelphia, 376 Pa. 379 (1954); 102 A. 2nd 887) At the same time, the freedoms of speech and press in particular are accorded the highest level of protection and will not be limited except for

imposing reasons. Thomas v. Collins, 323 U. S. 516-557 (1945); Com. v. Gordon, 66 D. & C. 101 (1949); Herndon v. Lowry, 301 U. S. 242 (1937).

Only in case of a clear and present danger of upheaval in the body politic from a speech or publication, has the Supreme Court recognized the authority of the state to abridge these freedoms. American Com. Association et al. v. Douds, 339 U. S. 382 (1949); Terminiello v. City of Chicago, 337 U. S. 1, 4 (1949); Com. v. Heetman et al., 81 D. & C. 488 (1952); Whitney v. California, 274 U. S. 357 (1927); Com. v. Gordon et al., 66 D. & C. 101 (1949); Thornhill v. Alabama, 310 U. S. 88 (1940); U. S. v. Carolene Products Co., 304 U. S. 144 (1938).

In Brattle Films, Inc. v. Commissioner of Public Safety, 127 N. E. 2nd 891 (1955), there was a statute providing for licensing of films for Sunday showing, if of proper character for that day. Plaintiff, after a series of rejections by the licensing authority, sued for an injunction. The Supreme Judicial Court of Massachusetts held that the law was unconstitutional as being violative of the First and Fourteenth Amendments of the United States Constitution. The Court said:

> "That the present controversy concerns exhibitions on only one day a week, and that day Sunday, does not seem to us to alter the governing rules of law. It is unthinkable that there is a power, absent as to secular days, to require the submission to advance scrutiny by governmental authority of newspapers to be published on Sunday, of sermons to be preached on Sunday, or public addresses to be made on Sunday."

To similar effect is Superior Films v. Dept. of Education of Ohio, 346 U.S. 587; 98 L. Ed. 329 (1954). These cases can be regarded as holding that, irrespective of the day, Sunday or weekday, our constitutions forbid the requiring of prior licensing for the exhibitions of motion pictures.

In 1941 it was held in Pennsylvania that freedom of the press extends beyond newspapers and periodicals and embraces the right to print and distribute pamphlets of various sorts, specifically in this case "The Watch Tower" magazine, which is issued by Jehovah's Witnesses. The press in its historic connotations comprehends every sort of publication which affords a vehicle of information and opinion, and there can be no requirement of obtaining a permit beforehand. Com. v. Reid et al., 144 Pa. Super. 569. Our court, following the Burstyn case, held the Pennsylvania statute on movie censorship to be invalid because of vagueness in Hallmark Productions, Inc. v. Carroll, 121 A. 2nd 584; 384 Pa. 348.

The only reason for which there can be a lawful and constitutional limitation upon freedom of speech and press is such justification as will fall reasonably under an exercise of the police power, previously referred to, the power of the state for protection of the health, safety and welfare of its citizens within reasonable limits.

The action of the United States Supreme Court in assimilating moving pictures to the press in the area of constitutional freedoms presents a new situation and one where all the ramifications have not yet become evident. The particular subject that was before the Supreme Court in the Burstyn case where the movie, "The Miracle", was involved, and in the Brattle case where a movie entitled

"Miss Julia" was involved, possessed religious overtones and dealt with the allegedly objectionable content of these movies, and with the topic of preliminary licensing.

The United States Court in the Burstyn opinion at pages 502, 503, said further:

> "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."

The Burstyn opinion, as abovequoted, recognized the possibility of necessary variations in the treatment of motion pictures as related to the holdings with regard to other media of expression protected by the federal Bill of Rights. In marking out the boundaries of the new doctrine, now that motion pictures have been assimilated to the press, the courts will face the question whether in a given instance or in motion pictures generally, with particular reference now to Sunday exhibitions, there is found any essential exposition of ideas; whether their content is of such slight social value as a step to truth that any benefit that may be derived from them is outweighed by the social interest in preservation of a fixed day of rest and repose for the population—the question of relative social utility. Cf. The Constitution of the United States of America Analysis and Interpretation, U. S. Printing Office (1953), Page 787; Chaplinsky v. New Hampshire, 315 U. S. 568; 86 L. Ed. 1031.

In our view, the free and unhampered access of citizens generally to information on a wide scale—that which we favor and that which we despise—is thoroughly essential

in a democracy. At the same time we do not see any virtue in trying to assimilate under one tent ideas which are substantially different. The concept of entertainment certainly differs from that of information, although there is an area where the two merge. It is trite to say "who is going to draw the line" between them, because that is the function of courts—to draw lines.

We consider it within the realm of reason under our constitutional freedom of expression that the legislature possess the power to regulate public entertainment on the assigned day of rest, meanwhile denying to the legislature the right to regulate, except within the broad limitations which affect the freedoms of expression and the dissemination of information.

In our view the Burstyn and related decisions do not prohibit the Pennsylvania legislature, in the exercise of the police power as hereinbefore discussed, to regulate and prohibit by the Sunday Movie Law the exhibition of motion pictures on Sunday in municipalities where a majority of the voters has voted against such exhibition.

And we are at the same time mindful of the principle set forth in West Virginia State Board of Education v. Barnette et al., 319 U.S. 624; 87 L. Ed. 1628 (1943), where the United States Supreme Court held unconstitutional a West Virginia statute requiring a flag salute, insofar as the same applied to Jehovah's Witnesses who refused to salute. The Court said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal

principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

NOW, this 7th day of June, 1957, the defendant is found guilty and, being present in court, is sentenced to pay a fine of $50.00 and the costs of prosecution, and in default thereof to undergo imprisonment in the county jail for the County of Franklin for a period of ten (10) days from this date.

By the Court:
P. J.

NOW, this 7th day of June, 1957, so much of the foregoing order as constitutes the sentence is hereby revoked, upon motion of counsel for the defendant, so that the defendant may on or before June 14, 1957, file a motion in arrest of judgment and for a new trial and the reasons therefor.

By the Court:
CHAUNCEY M. DEFUY,
P. J.

Opinion of Court of Quarter Sessions,
Franklin County, Pa.

(2) OPINION AND ORDER

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(2) OPINION AND ORDER OF AUGUST 10, 1957

This matter is before the Court upon defendant's motion in arrest of judgment and for a new trial. On Sunday evening, June 24, 1956, after a local option election in the township had resulted in a substantial majority vote against Sunday movies, the defendant as manager of the State Line Drive-In Theater, in Antrim Township, Franklin County, Pennsylvania, exhibited motion pictures. He was prosecuted for violation of the Sunday Motion Picture Act by a member of the State Police before a Justice of the Peace in the Borough of Greencastle, Franklin County. He was convicted on July 3, 1956, and sentenced to pay a fine of $50.00 and costs. The conviction was appealed to the Court of Quarter Sessions, evidence was heard de novo on September 12, 1956, on June 7, 1957, the Court found the defendant guilty and filed an opinion in which the Sunday Motion Picture Act was held to be constitutional. Defendant on June 11, 1957, filed the motions now before the Court.

The substance of these motions is:

I. Motion in Arrest of Judgment

The four grounds of unconstitutionality which were the basis of the original argument were renewed as enumerated below.

II. Motion for a New Trial

Para. 1. That the verdict was against the law.

Para. 2-8. That the Court erred in excluding certain evidence offered by defendant in the form of cross examination of Commonwealth's witnesses, the State Police, as to the showing of movies on TV sets in the township on Sunday.

Para. 9-10. That the Court erred in excluding testimony by the defendant as to the tenets of his Church with regard to Sunday activities.

Para. 11. That the Court erred in refusing to admit in evidence the defendant's Exhibits D and E, being TV *Guide* for the week of June 23, 1956, and *American T-Vue Time* magazine for the week of September 9, 1956.

Para. 12. That the Court erred in refusing to admit defendant's testimony as to his Sunday attendance at a public park in the County.

These motions were argued before the Court by respective counsel on July 26, 1957.

The matters raised at this time by the brief of defendant are in general the same as those raised by his previous briefs and argument, which were disposed of in the opinion of the court filed June 7, 1957. Our conclusion is now the same and we find the Act to be constitutional and that the defendant was properly convicted.

Defendant's arguments of unconstitutionality made in his original argument of the case and now renewed were as follows:

1. That the Sunday Motion Picture Act constitutes religious legislation falling under the ban of the federal and state constitutions;

2. That the Act constitutes a regulation of defendant's business and his liberty of employment by means of an unreasonable classification and therefore constitutes taking of property without due process of law, forbidden by both constitutions;

3. That even though the Act might be found constitutional in form, it is unconstitutional and discriminatory as administered by the public authorities of the Commonwealth and therefore denies to defendant the equal protection of the law and deprives him of liberty and property without due process of law contrary to both constitutions;

4. That the Act erred in abridging freedom of speech and of the press contrary to both constitutions.

With regard to his fourth contention, that the Sunday Motion Picture Law offends against freedom of speech and of the press, counsel has further argued his position based on these cases: Joseph Burstyn Inc. vs. Wilson, 343 U.S. 495; 96 L. Ed. 1098 (1952) and Brattle Films Inc. vs. Comr. of Public Safety, 127 N.E. (2) 891 (Mass 1955). The Burstyne case applied the previously existing federal case law defining the constitutional protection of the freedoms of expression to motion pictures. The Brattle case decided, following the Burstyn precedent, that a Massachusetts law was unconstitutional which required a movie, "Miss Julie", as a public entertainment, to be approved by the city as "in keeping with the character of the day" before it could be shown on Sunday. It seems to us this decision should instead have been reached on the basis of vagueness in the standard.

The defendant quotes United States vs. Twentieth Century-Fox Film Corp., 137 F. Supp. 78, 117, "Motion

pictures while essentially entertainment for profit, have also an educative value as a medium for the communication of ideas and are a method of expression protected by the free speech and free press guarantees of the first and fourteenth amendments."

Apparently it is defendant's contention that the United States Supreme Court under the doctrine announced in the Burstyn case has for all purposes assimilated the exhibition of motion pictures to freedom of speech by an individual on any subject within the ordinary purview of human expression. Granting the high protection given by our constitutional law to freedom of expression, certain exceptions are recognized: (1) where the expression is uttered in circumstances likely to give rise to a breach of the peace or to action tending to overthrow the government, or (2) where the utterance is made in a situation endangering the safety of a crowd of people, for example an individual who yells "Fire" in the midst of a crowded theater, (3) where the utterance occurs at a time or place and perhaps with the addition of a loud speaker destroying the quiet which the citizens are entitled to enjoy on any day, or on a Sunday or at night when people are presumably trying to sleep in preparation for the next day's work, (4) utterances calculated seriously to offend the religious or racial sensibilities of those who hear them, (5) utterances tending by their obscene character to undermine the moral fiber of the people and tending to bring about crime among young and old, and (6) other miscellaneous exceptions.

It seems clear that the right of an individual to free expression in its elemental features exists on Sundays as well as other days of the week and that in prescribing a

day of rest, the legislature would be without power to prescribe rest from public expression. Freedom of the press despite laws fixing a day of rest, may conceivably embrace the right to publish on Sunday or upon the legislatively established day of rest, whether or not the work of printing takes place on the preceding day, or whether the work of printing for the following day, Monday, must take place on Sunday. Of course, we are not called upon here to decide the question as to the operation of the printing presses or the distribution system of the newspapers and magazines on Sunday. We merely suggest that conceivably the social utility of the constitutional freedom of the press may protectively blanket the vast publishing industry in disseminating its product on every day of the week, including Sunday.

Leaving aside now these situations: (1) where the individual is entitled to enjoy freedom of speech on Sunday or any other day, (2) where the publishing industry may possess the right to publish seven days a week, we come to the third situation which poses this question: has the legislature under the police power the right to regulate or prohibit at times an industry which possesses characteristics far beyond the elemental necessities of freedom of expression. For clear thinking let us strip aside all trappings, including the mechanism or vehicle whereby freedom of expression may be encumbered under all circumstances, and get to the core of the matter. Is not the essential idea at the bottom of the constitutional freedom of expression the *content* of the expression, as distinct from the mechanism for disseminating information or for multiplying it? The state may not tell one *what* to print. May it tell him when or where he may print? Should we confuse the es-

sential right of free expression seven days a week with the vehicle, the accoutrements that may develop in the progress of history for multiplying the force and impact of expression. We conceive that the police power of the state may properly impinge upon one or more phases of the information-presenting or propagating mechanism, while at the same time that same police power cannot constitutionally impinge upon or limit the *content* of that expression, nor may it impede the right to be heard.

The United States Supreme Court has held in the Burstyn case that the legislature or its creatures, the Board of Censors or municipal subdivision, may not employ a standard different from or less precise than that which governs expression in the form of oral address or printed publication. We think that is a correct view. It is known that the oral or printed word may not constitutionally be subjected by the legislature to prior test or licensing. The United States Court has not yet established that, under a sufficiently specific set of legislative standards, the submission of motion pictures to prior examination and licensing may not be exacted, consistent with constitutional requirements.

The Court held that the prescribed legislative standard for evaluating a motion picture would have to be something specific and not vague, and that the classification "sacrilegious" was too vague to be recognized by the Court. In our view it is essential that under the constitution, the legislature have authority sufficient to rid the public scene of those printed publications and motion pictures which pander to the lowest instincts of mankind, which flood our communities with sexy publications, which promote sexual perversions which are expanding the divorce rate, breaking

up homes, increasing juvenile delinquency and increasing adult crime.

In our view the United States Supreme Court has granted to motion pictures the protection of the constitution with regard to the content of what they are saying. The machinery by which a crowd is gathered and the entertainment presented, the mechanism, the organization, the industry, the theater, whether indoors or outdoors, etc., are, we believe, still within the scope of the lawful exercise of the police power by the state.

It is entirely logical in our view to have one set of rules at law for the individual who stands in his own home or on the street corner or in a tavern expressing himself on a variety of subjects as he is constitutionally protected in doing. When the same individual is on a vaudeville or minstrel stage to express himself, with an audience gathered, and surrounded by the ramifications of the commercial entertainment industry, he becomes subject, under the police power, to another set of rules. By leaving the street corner and entering the theater in order to express himself, the individual exposes himself in various respects to legislative action within reasonable limits, for example in the area of fire regulations, building safety considerations, involved when perhaps a thousand persons have gathered; the assembling of great numbers of automobiles in a constricted locality, the problem of adequate rest for the personnel who operate the building and its facilities and in the sanitary regulations.

As we see it, the Legislature of Pennsylvania cannot bar as to content the free expression of ideas by motion pictures but still retains the power to deal with all the other

aspects of a public exhibition of moving pictures, as well as with the exhibition of other entertainment forms, including baseball, boxing, tennis, horse racing, polo, roller skating or whatever.

In short, the individual is protected in his constitutional freedom of expression as to speech or press, moving pictures or otherwise with regard to the unfettered content thereof, apart from limitations of obscenity and otherwise which we have discussed. But with regard to the other incidents which accompany his expression when this occurs in the form of public entertainment, characterized by the gathering of crowds and other incidents, the problem no longer falls under the category of freedom of expression but under the category of the proper scope of the police power of the state. As a police power question, the answer in the present prosecution under the Motion Picture Law was discussed in our earlier opinion. The basic problems are those of proper and non-discriminatory classification, and whether there is any aspect of the motion picture exhibition on Sunday which can under any reasonable view be termed harmful to society and therefore can constitutionally be made the subject of prohibitory or regulatory legislation.

Defendant seeks to improve his position by noting the fact that at the motion picture exhibition here involved, there was exhibited along with the principal film, a news reel. Whether this was a five minute news reel, an entire program of news reels or no news reel, our conclusion would be no different. Counsel refers to the showing of this news reel as "dissemination of information on Sunday". It is in fact a good deal more than that, in that a considerable apparatus was required for the assembling of a crowd and

the operation of a theater in order to display the news reel. A news reel may conceivably embody a page from the New York Times, but by dint of its being a "news reel", shown in a theater, there are features connected with its public exhibition which create a much different situation from that presented by the purchase of a copy of the New York Times.

In his motion for a new trial, defendant further relies upon alleged erroneous rulings by the Court upon the admissibility of evidence at the trial.

Defendant attempted, by cross-examining Commonwealth's witnesses, members of the state police, to show that at times and even on the same Sunday evening here involved, TV viewers violated the Sunday Motion Picture Act in Antrim Township because with their sets they received or "exhibited" one or more motion pictures. Defendant further attempted to show by these witnesses that the state police made no effort to check the homes in the township or other townships in the county which have voted to ban Sunday exhibitions of motion pictures to find out who actually was viewing a motion picture on his TV screen so that a prosecution could be made. Defendant tried to show by the same cross-examination that there would not be enough state police in the country to check all TV sets, and sought to draw the conclusion that the Motion Picture Act is discriminatory and unconstitutional if it is interpreted to prevent projection of pictures at a motion picture theater on Sunday but not to prevent the TV showing of motion pictures in homes. The defense also tried to cross-examine the police for the purpose of showing that golf courses, state parks and other places of public

entertainment were open on Sunday and that the police made no effort to close them, and that various other commercial enterprises were openly operated in the county on Sunday without prosecution under the Sunday closing law of 1794, reenacted in 1939.

Had there been any propriety in the character of this evidence which defendant sought to introduce by means of cross-examining the state police, it should have been presented as a part of defendant's own case.

Defendant contends that this cross-examination should have been allowed under the rule that cross-examination may embrace any matter, germane to the direct examination, qualifying or destroying it, or tending to develop facts which have been improperly suppressed or ignored by the party calling the witness. Conley vs. Mervis, 324 Pa. 577, 582. We do not find the rule is applicable here. We hold that to have permitted the police officers here to testify as to how many television sets were then owned in Franklin County or whether the police undertook to ascertain which ones were showing a motion picture on the Sabbath Day was a matter so unrelated to the officers' examination in chief that it could not constitute proper cross-examination, and we hold that it would not have been competent in any event, on the ground or relevancy.

The defense also undertook to show by its own witness, the defendant, a Roman Catholic, that he belongs to a particular religious faith in which his Sunday obligation is discharged by attending Mass and that during the rest of the day there is no religious objection to attendance by a communicant at motion pictures. This was properly excluded as irrelevant.

Opinion of Court of Quarter Sessions, Franklin County, Pa.

Defendant alleges error in the exclusion of his proffered Exhibits D and E. Exhibit D was a leaflet published at the time of the local option election in Antrim Township under the Motion Picture Act, urging all "good citizens of the township to perform their solemn duty and vote against Sunday movies in order to preserve the Sabbath Day as Christian and as a day of rest". Exhibit E was a letter signed by ministers of various churches of the area calling upon every citiizen of the area "to go to the polls and perform his Christian duty by voting against Sunday movies". We hold that this was not competent evidence to support the defendant's contention that the Act of the legislature constituted a religious preference, and was properly excluded.

The other grounds alleged by defendant in support of his motion for a new trial based on the Court's rulings upon evidence are without merit and are not discussed.

NOW, this 10th day of August, 1957, the defendant's motion in arrest of judgment and for a new trial are denied. The defendant is ordered to appear for sentence when called by the District Attorney.

By the Court:
CHAUNCEY M. DEPUY,
P. J.

Eo die, exception granted to the defendant.

By the Court:
CHAUNCEY M. DEPUY,
P. J.

APPENDIX B

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

In the Superior Court of Pennsylvania

No. 8 October Term, 1958

No. 75

Commonwealth of Pennsylvania

vs

Robert John Grochowiak, Appellant

Appeal from the Sentence of the Court of Quarter Sessions of Franklin County at No. 148 October Sessions, A.D.,1956.

Filed: November 12, 1957

Opinion by Hirt, J.

The defendant was the manager of State Line Drive-In Theatre located on U.S. Route 11, in Antrim Township, Franklin County. On Sunday, June 24, 1956, he as manager was responsible for the exhibition in the theater of certain motion pictures. Following the showing on the above Sunday, defendant was charged with violation of the Act

of July 2, 1935, P. L. 599, Par. 2. Section 2 of the Act, 4 PS Par. 60, is quoted in the margin.[1] After full hearing before a Justice of the Peace he was found guilty and a penalty of a fine and costs was imposed. On defendant's petition an appeal to the quarter sessions was allowed. Hearing thereon was had before Judge Depuy on September 2, 1956. The subject of the showings was not religious in character but the record is clear and it was not contended that the motion pictures as exhibited were obscene or offensive to good morals or that they had any effect on the

[1] It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibition, regardless of whether a charge of admission is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, before the hour of "two" o'clock postmeridian.

It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibitions, regardless of whether a charge of admission thereto or incidental thereto is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, after the hour of two o'clock postmeridian, unless the voters of the municipality have first voted in favor of motion picture exhibitions and sound motion picture exhibitions on Sunday as hereinafter provided, and in no case shall a person be employed as a projectionist or operator of motion pictures on Sunday or in or about motion pictures exhibitions, unless he or she shall have had twenty-four consecutive hours of rest during the preceding six week days.

Any person, copartnership, association or corporation violating any of the provisions of this section shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of fifty dollars ($50.00), and in default of the payment of such fine and costs of prosecution, such person or any member or agent of any copartnership or association, or any officer or agent of any corporation, responsible for such violation, shall be imprisoned for a period of not more than ten (10) days.

peace and good order of the community. They were innocuous from every viewpoint. The court found the defendant guilty of violation of the above Act and he was sentenced to pay a fine of $50 and costs. This is defendant's appeal from the judgment of sentence.

Sunday laws, regulating human conduct under the police power of a State, are of ancient origin. A short but interesting history of this kind of Sunday legislation appears in the brief of Burton R. Laub, now of the common pleas in Erie County, quoted in Commonwealth v. Pedano, 33 D. & C. 551. Our so-called Blue Laws, beginning with the Act of April 22, 1794, 3 Sm. L. 177, 18 PS Par. 1991 in general setting aside the first day of the week as a day of rest, are civil legislation (Cf. Specht v. Commonwealth, 8 Pa. 312) although they defer to the religious concept of Sunday as a Holy day. And the present act clearly is a civil regulation, although the provision for the lawful showing of motion pictures, only after 2 p.m. on Sundays undoubtedly appears in the Act in deference to the church-wide custom of Sunday morning services.

By the above 1935 Act, whether motion pictures may lawfully be shown on Sunday in any municipality was made a matter of local option. And in accordance with the Act a referendum to determine the question in Antrim Township had been submitted to the electorate, with the result, however, that the majority vote was against Sunday exhibition of motion pictures. The local option provision of the 1935 Act is valid. Waynesboro Sun. Movie Ref. Case, 383 Pa. 162, 117 A. 2d 699; Harrisburg Sunday Movie Petition Case, 352 Pa. 635, 44 A. 2d 46. Cf. Young v. Fetterolf, 320 Pa. 289, 182 A. 676. The prohibition of the statute therefore must control unless unconstitutional in other respects.

Appellant, conceding the validity of Sunday legislation in general, contends that the 1935 Act is unconstitutional in that it infringes upon the right of free speech and of the press. The exhibition of motion pictures is "within the ambit of protection which the First Amendment through the Fourteenth, secures to any form of 'speech' or 'the press' " and expression by means of motion pictures is included within these constitutional guarantees. Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 72 S. Ct. 777. But these rights of free speech are not absolute rights and a general and nondiscriminatory regulation of them in the public interest usually is not open to constitutional objection. As the Supreme Court said in the Burstyn case: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evidence from the series of decisions of this Court with respect to other media of communication of ideas." In Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, it is said: "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." The proceedings in Joseph Burstyn, Inc. v. Wilson, supra, had to do with the *content* of motion pictures. That case involved the question of the constitutionality of a statute which provided for the censorship of motion pictures. The holding was "that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.' " The present appeal does not involve the question of the content or the subject matter of the motion pictures but only the occa-

sion when they may be shown. The 1935 Act has nothing to do with the pictures portray, the story they tell or the philosophy they stress; content is not within the purview of the Act. For this reason the authorities on which appellant relies have no application. In general a restriction on free speech which merely limits the right as to time or place does not infringe upon the constitutional guarantees. And the 1935 Act in prohibiting the showing of motion pictures on but one day of the week without any limitation on their exhibition on the remaining six days is not unreasonable. The State in this case had the power to prohibit public amusements and exhibitions on Sunday.

There is no merit in the contention that appellant has been denied due process and equal protection on the ground that the Act is discriminatory in its terms because it fails to include in its subject matter all worldly amusements on Sunday, subjecting them to a prohibition similar to that against the showing of motion pictures. Bothwell v. York City, 291 Pa. 363, 370, 140 A. 130. The appellant has relied on the principle of Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064. That decision was considered in People v. Oreck et al., 168 P. 2d 186 and the argument of a denial of equal protection of the laws was discarded in this language: "Here the claimed discrimination is that those engaged in horse race betting are being prosecuted while those who run other types of illegal betting establishments are not. Such type of discrimination, if discrimination it be, is not within the rule of the above cases. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not." The discussion in Bothwell v. York City, supra, p. 370, is to the same effect.

Finally, there is no merit in the contention that the Act works an unreasonable classification. The relevant governing principles are stated in Seabolt v. Commissioners, 187 Pa. 318, 323, 41 A. 22, thus: "Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subject classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification." That is a correct statement of the present law in Pennsylvania. Cf. Garrett v. Turner, 235 Pa. 383, 389, 84 A. 354; Nat. Transit Co. et al. v. Boardman, 328 Pa. 450, 197 A. 239.

If people of a community want Sunday movies they must say so by a majority vote. Without such vote on a referendum there is no valid constitutional objection to the 1935 Act; it is within the scope of the lawful exercise of the police power of the State. Bothwell v. York City, supra; Com. v. Sherman et al., 14 D. & C. 1.

Judgment affirmed and the defendant is ordered to appear at a time to be fixed by the lower court, for compliance with the sentence imposed.

APPENDIX C

ORDER OF THE SUPREME COURT OF PENNSYLVANIA

February 12, 1958, Petition denied.
Per Curiam

APPENDIX D

ACT OF 1935, JULY 2, P. L. 599, AS AMENDED; 4 PA. STAT. ANN. 59

Section 1: Definitions.

Municipality Defined.—The word "municipality", as used in this act, shall be construed to mean and include any city, borough, town, or township of this Commonwealth.

Motion Picture Exhibitions Defined.—The words "motion picture exhibitions," as used in this act, shall be construed to mean any motion picture exhibitions or showings and sound motion picture exhibitions or showings, together with any orchestral or other instrumental musical or mechanical accompaniment, prelude, playing, or selection in connection therewith or incidental thereto.

Two O'clock Postmeridian Defined.—The words "two o'clock postmeridian," as used in this act, shall be construed to mean "two" o'clock postmeridian eastern standard time, except during the period commencing the last Sunday in April and ending the last Saturday in September inclusive, when such words shall be construed to mean two o'clock postmeridian eastern daylight saving time provided that eastern daylight saving time is the customary time in common use in such municipality during such period.

Act of 1935, July 2, P. L. 599, as Amended; 4 Pa. Stat. Ann. 59

Section 2: Penalty for unlawful motion picture exhibitions on Sunday.

It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibition, regardless of whether a charge of admission is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, before the hour of "two" o'clock postmeridian.

It shall be unlawful for any person, copartnership, association or corporation to conduct, stage, manage, operate or engage in any motion picture exhibitions, regardless of whether a charge of admission thereto or incidental thereto is made or whether labor or business is necessary to conduct, stage, manage or operate the same, on the first day of the week, commonly called Sunday, after the hour of two o'clock postmeridian, unless the voters of the municipality have first voted in favor of motion picture exhibitions and sound motion picture exhibitions on Sunday as hereinafter provided and in no case shall a person be employed as a projectionist or operator of motion pictures on Sunday or in or about motion picture exhibitions, unless he or she shall have had twenty-four consecutive hours of rest during the preceding six week days.

Any person, copartnership, association or corporation violating any of the provisions of this section shall, upon conviction thereof in a summary proceedings, be senteneed to pay a fine of fifty dollars ($50.00), and in default of the payment of such fine and costs of prosecution, such person or any member or agent of any copartnership or associa-

tion, or any officer or agent of any corporation, responsible for such violation, shall be imprisoned for a period of not more than ten (10) days.

Section 3: Referendum; statement of question of ballots.

At the municipal election in the year one thousand nine hundred and thirty-five (1935), there shall be submitted, in the manner provided by the election laws of the Commonwealth, upon petition to the county commissioners by the city or borough council or by the township commissioners or supervisors, or upon petition to county commissioners by electors equal to at least five per centum (5%) of the highest vote cast for any candidate in the municipality at the last preceding general election, a question to determine the will of the electors of each municipality in this Commonwealth, so petitioning, with respect to motion picture exhibitions. Such question shall be in the following form:

Do you favor the conducting, staging, operating and exhibiting of motion pictures, regardless of whether an admission charge is made or incidental thereto or whether labor or business is necessary to conduct, stage, operate or exhibit the same after two o'clock postmeridian, on Sunday?	YES NO

The said question shall be printed on separate official ballots, in bound form, by the county commissioners of each county, and sufficient number of ballots shall be furnished to the election officers in each election district of each municipality so that one ballot may be supplied to each voter at such election. In districts where voting ma-

chines are used, such question shall appear on the face of the machine where the machine is properly equipped for such purposes.

Section 4: Returns and computation of votes.

The votes cast on such question shall be counted by the election officers and returns thereof made by them, and by election officers where voting machines are used, to the prothonotary of the county, who shall lay the same before the return board for computation at the same time and in the same manner as other returns. Such election shall be governed by the election laws of the Commonwealth, and all penalties provided by said laws shall apply to such elections. The return board shall compute the said returns by municipalities, and certify the results of the vote cast on the question to the acting chief executive officer of each municipality affected.

If at the election in the year one thousand nine hundred and thirty-five (1935), where any such election was held as herein provided, a majority of the electors in any municipality voting at said election vote in favor of motion picture exhibitions on Sunday after the hour of two o'clock postmeridian, then upon the certification of such election return to the acting chief executive officer of such municipality, as is provided in the section, it shall thereafter be lawful to conduct, stage, manage, operate or engage in motion picture exhibitions from and after the hour of two o'clock postmeridian, on Sunday.

The right to conduct, stage, manage, operate or engage in such motion picture exhibitions shall be subject only to those rules and regulations which govern motion picture exhibitions on days of the week other than Sunday.

If the vote of the electors in the municipality was not in favor of motion picture exhibitions or if no such election was held, then it shall be unlawful to conduct, stage, manage, operate or engage in such motion picture exhibitions to which an admission charge is made or is incidental, after two o'clock postmeridian, on Sunday.

Section 5: Further referendums.

In any municipality the will of the electors with respect to the conducting, staging, and exhibiting of motion pictures and sound motion pictures on Sunday may, after the year one thousand nine hundred and thirty-five (1935), but no oftener than once in four years, be ascertained, and the question, as provided in section 3 of this act, shall be submitted to the electors of any municipality at any municipal election upon demand in writing of petitioners equal to at least twenty per centum (20%) of the highest vote cast for any candidates in the municipality at the last preceding general or municipal election. Such petition shall be filed with the corporate authorities at least sixty (60) days before the day of any municipal election at which the question is to be submitted, and, if the petition is signed by the requisite number of petitioners, it shall thereupon be certified to the county commissioners, who shall cause such question to be submitted in the same manner as is provided in this act for the election in the year one thousand nine hundred and thirty-five (1935).

If a majority of the voters, in any municipality in which motion picture exhibitions are permitted from and after two o'clock postmeridian on Sunday to which an admission charge is made or is incidental, are not in favor of the continuance of such exhibitions, then upon the certification of such election return to the acting chief execu-

tive officer of such municipality, as is provided in section four of this act, it shall thereafter be unlawful to conduct, stage, manage, operate or engage in such exhibitions after two o'clock postmeridian, on Sunday; but if a majority of the electors in any such municipality which has not heretofore permitted such motion picture exhibitions after two o'clock postmeridian, on Sunday, or which has not theretofore voted on such question are in favor of such exhibitions, then upon the certification of such fact to the acting chief executive officer of such municipality, as is provided in section 4 of this act, such exhibitions shall thereafter be lawful.

Section 6: Intent of act.

It is the intent of this act to provide a method whereby the will of the electors of each municipality with respect to motion picture exhibitions, together with orchestral or other instrumental musical or mechanical musical accompaniment, prelude, playing or selection in connection with or incidental thereto after two o'clock postmeridian on Sunday may be ascertained.

Section 6.1: Nonapplicability of act.

The provisions of this act shall in no way prohibit the exhibition of religious motion pictures by churches at any time: Provided, however, That the said motion pictures shall be exhibited within church property; And provided further, That no admission charge shall be made.

Section 7: Motion pictures only entertainment permitted.

It shall be unlawful at any motion picture exhibition conducted or operated, under the provisions of this act, to provide for any form of entertainment, except the exhibi-

tion of motion pictures and sound motion pictures and any orchestral or other instrumental musical or mechanical musical accompaniment, prelude, playing or selection in connection with or incidental thereto, and any person or any member or agent of any copartnership or association, or any member or officer of any corporation who shall provide or furnish or assist in providing or furnishing any other form of entertainment in such motion picture exhibitions shall be guilty of a misdemeanor, and in the proper court shall be punished by a fine of one hundred dollars ($100.00). Each Sunday's providing, furnishing, conducting, staging, managing, operating or engaging in furnishing any form of entertainment, forbidden under this act, shall constitute a separate offense hereunder.

Section 8: Constitutionality.

The provisions of this act are severable, and if any of the provisions hereof are held to be unconstitutional, the decision shall not be construed to impair any other provision of this act. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included herein.

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IN THE

Supreme Court of the United States

October Term, 1958
No. 166

ROBERT JOHN GROCHOWIAK,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Superior Court of Pennsylvania

MOTION TO DISMISS

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Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 166

ROBERT JOHN GROCHOWIAK,

Defendant-Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee

On Appeal from the Superior Court of Pennsylvania

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the ground that it does not present a substantial federal question.

STATEMENT

On November 8, 1955, the voters of Antrim Township, Franklin County, Pennsylvania, cast ballots on the question of whether motion pictures should be shown on Sunday in the township. The result of the voting was "Yes" 301, "No" 747. The procedure followed was in conformity to the Pennsylvania Act of July 2, 1935, Pamphlet Laws 599, as amended, 4 Pa. Stat. Ann. §§ 59-66, which prohibits the exhibition of motion pictures on Sunday except for those shown after two o'clock postmeridian in localities where the voters have approved such showings.

Subsequently, on June 24, 1956, despite this disapproval by the voters, appellant, manager of an outdoor movie theater in Antrim Township, caused a motion picture to be exhibited. Appellant was arrested for violation of the above statute and found guilty by a Justice of the Peace. He was sentenced to pay a fine of fifty dollars and costs or to serve ter days in the Franklin County jail.

His conviction was affirmed on appeal by the Franklin County Court of Quarter Sessions which held a de novo hearing and also by the Superior Court of Pennsylvania on further appeal. Appellant's petition to the Supreme Court of Pennsylvania to allow an appeal from the judgment of the Superior Court was refused, and this appeal followed.

ARGUMENT

Appellant here calls into question under the Constitution of the United States a provision of Pennsylvania statute law making unlawful the exhibiting of motion pictures on Sunday except insofar as the voters of a particular political subdivision of the state have, by referendum, voted in favor of exhibiting motion pictures after two o'clock postmeridian in that subdivision. The provisions of the federal constitution relied upon by appellant are the First and Fourteenth Amendments. Since the First Amendment imposes no restrictions upon the various states, *Twining v. New Jersey*, 211 U. S. 78 (1908), *Adamson v. California*, 332 U. S. 46 (1947), appellant's reliance must necessarily be upon the Fourteenth Amendment. The latter amendment, however, has made all the guarantees of the First Amendment applicable to the states, *Everson v. Board of Education*, 330 U. S. 1 (1947); and, thus, the issues posed by appellant remain fully for consideration.

1. Appellant first attacks the Pennsylvania statute as violative of the guarantees of free speech and free press. In effect, appellant contends that because expression through motion pictures is protected by these guarantees, the state is powerless to prohibit the showing of motion pictures on Sunday unless authorized by local referendum. In so doing appellant confuses state regulations designed to prevent free expression altogether or in undiluted form, *Martin v. Struthers*, 319 U. S. 141 (1943), *Burstyn v. Wilson*, 343 U. S. 495

(1952), with state regulations which simply forbid certain activities on Sunday without purporting to affect the content or form of the expression. On the other six days of the week appellant is free to exhibit motion pictures as he likes as far as the challenged statute is concerned.

The interest of the state in providing for a day relatively free from public activity for its citizens does not constitute such a restriction of the guarantees of free speech and free press as to violate the Fourteenth Amendment. Whatever limitation occurs does so within the very narrow orbit of a motion picture exhibition only and without censorship or discrimination.

2. No religious preference is created by that provision of the statute, section 6.1, which excepts the exhibition of religious motion pictures by churches on church property from its prohibition. To the contrary, the lack of such an exception might have exposed the statute to attack as interfering with the exercise of religion were it applied to prevent the showing of a religious motion picture in a church. Secondly, the statutory exception simply places religious organizations holding exercises on Sunday in the same position as those holding exercises on any other day of the week. It does not grant them a preference withheld or not enjoyed by organizations celebrating other days. Appellant cannot point to any religious preference or impediment in this section.

Nor does the statute constitute an unconstitutional interference with the religious beliefs of those persons who observe a day other than Sunday as the Sabbath. Sunday laws have long been recognized as civil in

nature regardless of the fact that religious views may have influenced the choice of Sunday as the day of rest. "It is none the less a civil regulation because the day . . . is kept by many under a sense of religious duty." *Hennington v. Georgia*, 163 U. S. 299, 304 (1896). See also *People v. Friedman*, 302 N. Y. 75, 96 N.E. 2d 184 (1950), appeal dism'd 341 U. S. 907 (1951).

3. Appellant next contends that the enforcement of the questioned act by public officials so as to exclude motion pictures exhibited on television constitutes a violation of his right to equal protection of the law. The two cases cited by appellant in this regard, *Philadelphia Retail Liquor Dealers Association et al. v. Pennsylvania Liquor Control Board et al.*, 360 Pa. 269, 62 A. 2d 53 (1948), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1885), however, effectively reveal the fallacy in appellant's contention. The state decision held only that a screen exhibition on television on the premises of an establishment licensed under the Pennsylvania Liquor Control Act of July 18, 1935, Pamphlet Laws 1246, 47 Pa. Stat. Ann. §§ 744-602, now repealed, was a moving picture exhibition so as to require the licensee to obtain an amusement permit from the Pennsylvania Liquor Control Board. This extension of the plenary regulation of an establishment licensed to sell alcoholic beverages occurs in a context far removed from that presented here.

But even assuming that television exhibitions of moving pictures are within the definition of motion picture exhibitions in the law here under attack, the fact that Pennsylvania's police officers have not enforced it against television station managers or

against private home owners who view such exhibitions on their sets hardly presents a systematic pattern of discrimination depriving appellant of his constitutionally guaranteed rights as *Yick Wo v. Hopkins*, supra, requires. Initially, appellant has made no record of such deprivation by state officials except to obtain an admission from a state policeman that the police have not checked private homes on Sunday to see if television sets are being used. It is submitted by appellee that this lack of police activity stems more from the practical impossibility of undertaking such a task than from any deliberate decision to discriminate against appellant. When viewed in light of the act's purpose, this course of action seems perfectly rational. Appellant has no constitutional right to demand that law enforcement officials achieve perfection in the prevention of a certain crime before he can validly be prosecuted for committing such crime. *People v. Oreck et al.*, 74 Cal. App. 2d 215, 168 P. 2d 186, 190 (1946).

Additionally, appellant makes no showing either that any person similarly situated (manager of a movie theater open to the public) has purposely been left free to operate while he has been prosecuted or that he himself has been prosecuted for reasons of race, religion or any other protected status.

4. Appellant's final contention is that the statute involves an unreasonable classification and is thus void under the due process and equal protection clauses of the Fourteenth Amendment. Apparently, this argument is based on three theories: (a) the banning of motion pictures on Sunday, regardless of the necessity of labor or business to conduct them,

bears no reasonable relation to the purpose of providing a day of rest for the public; (b) if providing a day of rest is necessary and proper for legislative action, no reasonable distinction can be made which justifies the allowance of religious motion pictures on church property and regular motion picture exhibitions where approved by the local electorate; and (c) such an exercise of the police power lacks a reasonable basis in view of the many exemptions from Sunday laws contained in other statutes.

The difficulty with appellant's theories is that he would demand perfect harmony and uniformity in order to sustain Sunday legislation. Otherwise, he would require that judicial views as to the wisdom of particular exemptions be substituted for legislative determination. State regulation designed to restrict Sunday activities with reasonable exceptions for recreational, amusement, charitable or necessary activities have long been sustained as valid exercises of the state police power. See *Petit v. Minnesota*, 177 U. S. 164 (1900). The presence of exceptions alone does not invalidate such regulations, and failure to provide such an exception for motion picture exhibitions is likewise not enough to cause the law to fall. Only if the prohibition on motion pictures is unreasonable is the constitution offended. Appellee does not believe that the ban here involved is unrelated to valid considerations of public health, safety, morals or welfare, particularly in the present context of a public exhibition by a commercial enterprise.

The presence of exceptions within the ban on movies for church exhibitions and exhibitions where approved by the local populace are far from unreasonable. As

noted, supra, an attempt to ban religious pictures might well involve the state in a problem of interference with religion. Relaxation of the prohibition where approved locally hardly raises a question of unconstitutional discrimination if the legislative action initially is justifiable. It merely presents a legislative grant of home rule to local political subdivisions, a process becoming more and more used and useful in the administration of local affairs. The referendum method carries this approach to the most democratic extreme, similar to the town meeting. Local determination of such matters cannot, of course, obviate valid constitutional objections; but the use of local referenda should not destroy the validity of otherwise reasonable and proper regulation where the local decision does not itself discriminate.

CONCLUSION

Sunday laws have a long history in the states of this nation and in England. It cannot be claimed that they present a perfect pattern in approach nor a reflection of unanimous public sentiment; but one need hardly describe them as beautiful in their symmetry nor desirable in all their aspects in order to sustain their constitutionality. The Pennsylvania statute prohibiting motion pictures on Sunday presents no features on its face or in its enforcement which are constitutionally objectionable. As short a time ago as 1950 the New York Court of Appeals considered a New York Sunday law in an analogous factual situation and unanimously found no unconstitutional features. *People v. Friedman*, 302 N. Y. 75, 96 N.E. 2d

184 (1950). On appeal this Court dismissed for want of a substantial federal question. 341 U. S. 907 (1951). Nothing has occurred since that decision to give merit to the present appeal or lend substantiality to the questions raised.

For the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

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FILED
AUG 28 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 166

ROBERT JOHN GROCHOWIAK

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

REPLY BRIEF

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Appellee

REPLY BRIEF

This Reply brief will serve to clarify certain points raised by Appellee in its Motion to Dismiss.

I

The First Amendment provides, "Congress shall make *no law* . . . . abridging the freedom of speech, or of the press . . ." No distinction is made between laws totally prohibiting free expression and those simply limiting the area, time or place of free expression. The constitutional prohibition is total and explicit, and must override the equally total and explicit prohibition against free expression for one day in seven. No leeway is given for the setting aside of the First Amendment guaranty of freedom of expression. The Fourteenth Amendment made said provision applicable to the Pennsylvania Statute here under review.

Wholly independent of the questions concerning religion, discrimination and unequal enforcement herein-

after referred to, this Court has never considered the important question whether freedom of speech or of the press may be the subject of an arbitrary absolute or partial prohibition for a specified period of time.

II

Contrary to the Appellee's argument the unrefuted evidence and the precise language of Section 2 and Section 6.1 point unequivocally to the religious nature of the Act here in question. No "Sunday Law" has been reviewed by this Court since the Fourteenth Amendment was construed to make all the guarantees of the First Amendment applicable to the states. Civil rights are not lost by historical default and error compounded by error remains nonetheless error.

III

Perfection in the enforcement of the statute in question is not sought. The unconstitutional discrimination lies in the failure to make an *effort* to enforce the Act as to others "exhibiting motion pictures" on Sunday.

IV

The court below found the motion pictures exhibited were not obscene, offensive to good morals or had any effect on the peace and good order of the community. (Appendix B, pages 65, 66) The record is barren of evidence pointing to adverse effects upon public health, safety, morals or welfare.

Respectfully submitted,

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FILED
NOV 3 1958
JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM 1958

No. 166

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v.

COMMONWEALTH OF PENNSYLVANIA
Appellee

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 166

ROBERT JOHN GROCHOWIAK

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

Appellee

The Honorable Court is respectfully urged to reconsider its order of October 13, 1958, dismissing the appeal for want of a substantial federal question, for the following reasons:

1. The dismissal of this appeal leaves in grave jeopardy the constitutional guaranty of free speech and free press as applied to the dissemination of news, information and entertainment via motion pictures and in practical effect affirms the position of the lower courts that the state may arbitrarily prohibit such dissemination.

2. The dismissal of this appeal creates a sharp conflict between the decision of the Superior Court of Pennsylvania and the long series of decisions of your Honorable Court strictly limiting encroachments on the First Amendment Freedoms.

3. Recurrence of a question has been recognized by your Honorable Court as grounds for consideration on the merits, *Teamsters Union v. Vogt, Inc.* 354 U. S. 284; and subsequent to the docketing of this appeal the cases of *Ullner v. Ohio,* No. 426 Oct. Term 1958 and *Kidd and Mills v. Ohio,* No. 465, Oct. Term 1958 were docketed in this Court. These cases, like this appeal, raise the question of the constitutionality of a Sunday closing statute on grounds of unequal protection of the law, deprivation of property without due process of law and religious legislation.

BACKGROUND OF THIS CASE

Appellant in his capacity as manager of the State Line Drive-In Theatre, located in Antrim Township, Franklin County, Penna., exhibited a newsreel and certain motion pictures on Sunday evening June 24, 1956. No evidence was introduced or contention made that the newsreel or motion pictures were obscene, offensive or that they had any adverse effect on the peace and good order of the community, and it was established that one of the motion pictures was available for exhibition by television in the same area and at the same hour as its exhibition by appellant.

The Sunday exhibition had not been approved by the electorate of Antrim Township and the appellant was prosecuted and found guilty of violation of Section 2 of the Act of July 2, 1935, P. L. 599, 4 Pa. Stat. Ann. 60 (Supp. 1957). In subsequent appeals to the Court of Quarter Sessions of Franklin County, Penna. and the Superior Court of Pennsylvania, appellant contended the Act here in question was repugnant to the Constitution of the United States and the decisions of those courts were in favor of the validity of the statute. The Supreme Court of Pennsylvania refused appellant's petition for allowance of an appeal.

Your Honorable Court on October 13, 1958, dismissed this appeal for want of a substantial federal question.

ARGUMENT

I

THIS APPEAL SHOULD BE ALLOWED TO REESTABLISH FREEDOM OF SPEECH AND THE PRESS AS FUNDAMENTAL RIGHTS

This appeal concerns not only the liberty and property of the individual appellant but also the status of the First Amendment freedom of speech and the press as applied to the exhibition of motion pictures as a media for the dissemination of information. If the door to the constitutional prohibition, restriction or regulation of one of the media for the dissemination of information is allowed to remain open, it is respectfully submitted a first step is being taken toward the day when those media may be entirely controlled.

The chief thrust of the appellee has been along the lines that the Act here in question makes no effort to affect form or content of expression, but simply prohibits the expression and further the electorate may remove the prohibition. This is hardly a sufficient answer to the definitive pronouncements of your Honorable Court that "expression by means of motion pictures is included within the free speech and free press guaranty . . ." *Burstyn v. Wilson,* 343 U. S. 495, 502 (1952); "One's right to . . . free speech, a free press . . . may not be submitted to a vote; they depend on the outcome of no election.", *West Virginia State Board of Education v. Burnette* et al 319 U. S. 624, 683 (1943); "Freedom to distribute information to every citizen wherever he desires to receive it . . . must be fully preserved," *Martin v. Struthers,* 319 U. S. 141, 146

(1943); "The power of a state to abridge freedom of speech . . . is the exception rather than the rule . . .", *Herndon v. Lowery* 301 U. S. 242, 258 (1937); "The freedoms guaranteed by the First Amendment . . . occupy a preferred position under our law", *Thomas v. Collins,* 323 U. S. 516 (1944).

As recently as *Speiser et al v. Randall* et al Nos. 483 and 484 and *National Association for the Advancement of Colored People v. Alabama* No. 91, both decided June 30 ,1958, this court alluded to the constitutional guarantees of free speech and free press and free association as "these indispensable liberties" and further noted the withdrawal of mailing privileges or the opportunity to invoke the facilities of the National Labor Relations Board and the withholding of tax exemptions constituted a deprivation of free speech and press. The consistency of this court's reasoning through these most recent decisions requires rejection of the alien philosophy sustained by the courts below and at the very least plenary consideration of the application of a Sunday closing statute to these fundamental freedoms.

II

BY REASON OF RECURRENCE OF IMPORTANT CIVIL RIGHTS QUESTIONS HERE INVOLVED THIS APPEAL SHOULD BE ALLOWED

In the past two years three cases have been brought up to this Court on various aspects of Sunday closing laws: *Gundaker Central Motors v. Gassert*, 354 U. S. 933 (1956); *Taylor v. Pine Bluff*, 352 U. S. 894 (1956); *Hickenbotham v. Williams*, 353 U. S. 961 (1957). In each instance this Court has refused to hear the questions raised. In the present term of Court in addition to this appeal two other appeals have been docketed likewise raising the issue of the constitutionality of Sunday closing laws by reason of the constitutional requirements of due process and equal protection of the law and the prohibition against religious legislation: *Ullner v. Ohio* No. 426, October Term 1958, *Kidd et al v. Ohio* No. 465 October Term 1958.

The issues here raised involving Sunday closing laws have not been reviewed by this Court since *Petit v. Minnesota*, 177 U. S. 164 (1900) and at that time the Fourteenth Amendment had not yet been interpreted to apply the fundamental freedoms of the First Amendment to the states.

In *Irvine v. Calif.*, 347 U. S. 128, 147 (1953) this Court held, "Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the due process clause judicial judgment is involved in an empiric process, in this sense, that results are never predetermined or mechanically ascertainable." The rash of cases above referred to evidences a recognition on the part of the citizenry that

the substantive constitutional law of this country has kept pace with an expanding and motorized economy and an awakened and enlightened interest in the rights of fellow citizens not sharing the same religious or political beliefs or the same color of skin.

In *International Brotherhood of Teamsters v. Vogt, Inc.* 354 U. S. 284, 287 (1957) this court held, "In view of the recurrence of the question, we thought it advisable to grant certiorari and to restate the principles governing this type of case." The issues here involved concerning individual rights will remain an area of confusion breeding further litigation until such time as the Supreme Court of the United States resolves the conflicting claims of right.

CONCLUSION

For the foregoing reasons we respectfully submit that this Court's order dismissing the appeal should be reconsidered and the appeal allowed to effect a complete determination of the issues in this case.

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CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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Of Counsel